

THE BALANCE PUZZLE: THE ECJ'S METHOD OF PROPORTIONALITY REVIEW FOR COPYRIGHT INJUNCTIONS

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ABSTRACT

Fundamental rights play an important role in the demarcation of copyright enforcement. This is especially true when the right holder seeks an injunction against an intermediary. The ECJ has applied a fair balance test to resolve fundamental rights conflicts in these situations. This balancing test has been subject to widespread criticism. Critics argue that this test is inherently flawed and would promote legal uncertainty. This paper demonstrates that the ECJ has nevertheless gradually embraced a more structured method of review, based on the principle of proportionality.

1. INTRODUCTION

Modern copyright law is characterised by a growing awareness of the tension between the protection of the right to intellectual property (IP)¹ and other fundamental rights.² This tension manifests itself in all areas relating to copyright, including the interpretation of the exclusive right of the copyright holder to communicate the work to the public,³ the scope of copyright exceptions and limitations⁴ and copyright enforcement.⁵

The increasing role of fundamental rights in copyright law is a direct consequence of the entry into force of the Treaty of Lisbon. Based on this Treaty, the EU Charter of Fundamental Rights (CFR) became legally binding.⁶ Article 6(1) of the Treaty on the European Union (TEU)⁷ states that the Charter has the same legal value as the TEU and the Treaty on the Functioning of the

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¹ Intellectual property rights are an aspect of the right to property. They are protected under Article 17(2) of the EU Charter of Fundamental Rights.

² O. Fischman Afori, 'Proportionality – A New Mega Standard in European Copyright Law' (2014) 48 *IIC* 890.

³ ECJ 8 September 2016, C-160/15, *GS Media*.

⁴ See ECJ 1 December 2011, C-145/10, *Eva-Maria Painer*; ECJ 3 September 2014, C-201/13, *Deckmyn*; ECJ 21 October 2010, C-467/08, *Padawan*.

⁵ See e.g. ECJ 29 January 2008, C-275/06, *Promusicae*; ECJ 24 November 2011, C-70/11, *Scarlet Extended*; ECJ 16 February 2012, C-360/10, *Netlog*; ECJ 27 March 2014, C-314/12, *UPC Telekabel*; ECJ 15 September 2016, C-484/14, *McFadden*.

⁶ Charter of Fundamental Rights of the European Union, [2012] OJ C-326/02, hereinafter: CFR.

⁷ Consolidated Version of the Treaty on the European Union, [2010] OJ C-83/01, hereinafter: TEU.

European Union (TFEU),⁸ which means it belongs to the primary legislation of European Union law. Therefore, the Charter has primacy over secondary legislation, such as directives and regulations.

In the field of copyright enforcement, the influence of fundamental rights has grown rapidly. This is in particular the case in situations where the right holder seeks an injunction against an intermediary. The legal basis of an injunction rests on Article 8(3) Copyright Directive, which contains a provision almost identical to Article 11(3) of the Enforcement Directive.⁹ On the basis of this provision, injunctions may be granted to intermediaries regardless of their liability.

A number of fundamental rights play a part when an injunction against an intermediary is in question. For instance, a website blocking order may infringe the freedom to receive information of its users (Article 11 CFR), but also potentially encroaches on the freedom of the intermediary to conduct a business (Article 16 CFR).¹⁰ In this situation and other situations, collisions between the right to intellectual property, which is an aspect of the right to property (Article 17(2) CFR), and other fundamental rights are inevitable. The Court of Justice of the European Union (ECJ) has applied a fair balance test to resolve fundamental rights conflicts that arise when a right holder asks for an injunction against an intermediary.¹¹

The fair balance test as employed by the ECJ, but also as a general concept, has received a fair amount of criticism. An important part of this criticism is aimed at the presumed vagueness of the notion. In addition, the application of the principle of proportionality, laid down in Article 52(1) CFR, remains inconsistent. Some authors have pointed out that this principle plays a vital role in the reconciliation of the right to intellectual property with other fundamental rights.¹² The *McFadden* judgment forms an example of a more detailed application of this principle.¹³

2. INJUNCTIONS AGAINST INTERMEDIARIES

The employment of remedies against intermediaries has grown swiftly in the past years.¹⁴ The roots of this growth lie in the difficulties copyright holders experience when going after infringers directly. On the one hand, this method has proven to be ineffective and cost-intensive. On the other hand, it has harmful effects on the public image of the copyright holder. Right holders often find themselves confronted with the impossibility of holding an

⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ L-326/47-326/390, hereinafter: TFEU.

⁹ Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 On the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L-167, hereinafter: Copyright Directive; Directive 2004/48/EC of the European Parliament and of the Council of April 29, 2004 On the Enforcement of Intellectual Property Rights [2004] OJ L-195, hereinafter: Enforcement Directive.

¹⁰ Regarding the right to the freedom to conduct a business and the freedom of information, see ECJ 27 March 2014, C-314/12, *UPC Telekabel*.

¹¹ See ECJ 29 January 2008, C-275/06, *Promusicae*. See also: P. Oliver & C. Stothers, 'Intellectual property under the Charter: are the Court's scales properly calibrated?' (2017) 54 *Common Market Law Review* 565.

¹² See Fischman Afori, (n 2) 898-901; J. Christoffersen, 'Human rights and balancing, the principle of proportionality' in C. Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar 2015) 19-38.

¹³ ECJ 15 September 2016, C-484/14, *McFadden*.

¹⁴ C. Geiger & E. Izyumenko, 'The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking' (2016) 32 *Am. U. Int'l L. Rev.* 44.

intermediary liable for infringements committed by its users, as in most cases the intermediary is exempted from all forms of liability.

The legal basis for this exemption can be found in the so-called “safe harbour” of the E-Commerce Directive, laid down in Articles 12, 13 and 14. These provisions specifically rule out liability of intermediaries that merely pass on or provide access to information, store data through caching or provide hosting services.¹⁵ The scope of the safe harbour encompasses all forms of wrongdoing, including, but not limited to, infringement of intellectual property rights.¹⁶

The applicability of the safe harbour exceptions does not necessarily entail that copyright holders are deprived of all prospects of protecting their interests. Under Article 8(3) of the Copyright Directive, Member States are obliged to ensure that right holders can apply for an injunction against intermediaries when their services are used by a third party in order to infringe a copyright or related right.¹⁷ This provision is based on the general provision for IP injunctions against intermediaries, laid down in Article 11 of the Enforcement Directive.¹⁸ In *L'Oréal v eBay*, the ECJ clarified that an injunction can be sought in order to bring infringements to an end, but also to prevent those infringements from occurring in the future.¹⁹

Article 8(3) of the Copyright Directive has formed the basis of a wide range of injunctions. Examples from ECJ case law include a duty to provide personal data,²⁰ mandatory blockage of a website,²¹ an obligation to filter electronic communications²² and an imposition of a duty to secure a wireless network through password restriction.²³ Most Member States have incorporated a practically unaltered version of the provision in their domestic laws.²⁴

2.1. *National divergences and their limits*

The specific conditions and modalities relating to the aforementioned injunctions are left to national law.²⁵ This creates divergences in interpretation between Member States, as can be seen in domestic case law. A textbook example of such deviations is apparent from the case law concerning website blocking orders. For various reasons, such as different interpretations of directive provisions, or the existence of additional requirements under national law, the outcome of rulings on the permissibility of this remedy varies between states.²⁶

However, despite these divergences, the European legislative framework does

¹⁵ Articles 12 (“Mere conduit”), 13 (“Caching”) and 14 (“Hosting”) of the E-Commerce Directive.

¹⁶ Also covered by the safe harbour are legal wrongs derived from private law, such as hate speech or incitement to violence. See C.A. Angelopoulos & S. Smet, ‘Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability’ (2016) 8 *Journal of Media Law* 268.

¹⁷ Article 8(3) of the Copyright Directive.

¹⁸ Article 11 of the Enforcement Directive.

¹⁹ ECJ 12 July 2011, C-324/09, *L'Oréal v eBay*, para 131. See also ECJ 24 November 2011, C-70/11, *Scarlet Extended*, para 31; ECJ 16 February 2012, C-360/10, *Netlog*, para 29.

²⁰ See ECJ 29 January 2008, C-275/06, *Promusicae*; ECJ 19 April 2012, C-461/10, *Bonnier Audio*.

²¹ See ECJ 27 March 2014, C-314/12, *UPC Telekabel*.

²² See ECJ 24 November 2011, C-70/11, *Scarlet Extended*.

²³ See ECJ 15 September 2016, C-484/14, *McFadden*.

²⁴ P. Savola, ‘Proportionality of Website Blocking: Internet Connectivity Providers as Copyright Enforcers’ (2014) 5 *JIPITEC* 119.

²⁵ Recital 59 of the Copyright Directive; see also Recital 23 of the Enforcement Directive.

²⁶ See for a comprehensive overview Savola (n 24) 122-125.

indeed provide some general rules regarding remedies against intermediaries. As follows from *L'Oréal v. eBay*, the standards and principles laid down in EU legislation are relevant when the admissibility of an injunction is in question.²⁷ In this judgment, the ECJ has set out the minimum standards to which IP injunctions must adhere. Specifically, the conditions laid down in the Enforcement Directive must be met:

(...) [T]he third sentence of Article 11 of Directive 2004/48 must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, dissuasive and must not create barriers to legitimate trade.²⁸

The general requirements of effectiveness, proportionality and dissuasiveness, as well as the obligation to avoid barriers to legitimate trade, are derived from Article 3(2) of the Enforcement Directive.²⁹ Furthermore, Article 15 of the E-Commerce Directive excludes the imposition on exempted intermediaries of a general obligation to monitor information transmitted by those intermediaries. This prohibition must be read in conjunction with Article 3(2) of the Enforcement Directive.³⁰

2.2. *Fair balance between IP and other fundamental rights*

In claims against intermediaries, several fundamental rights are at stake, as the example in the introduction already demonstrated. On the side of the copyright holder, the fundamental right to intellectual property as laid down in Article 17(2) of the Charter is relevant. This right can collide with other fundamental rights of other actors, such as the right of an intermediary to conduct a business, the right of the public to receive information as well as the rights to privacy and data protection of the public.³¹ In copyright enforcement, these rights collide inherently, as their underlying interests are often contradictory. For example, copyright holders may benefit from an injunction that compels an ISP to block a website containing infringing material from its users. However, such a measure is capable of restricting the freedom of these users to receive information. If the measure implies processing personal data (i.e. through filtering³²), the right to data protection of the users may also be infringed.

As has been explained before, the EU regulatory framework does not harmonise which measures can be subject to an injunction, nor does it provide the conditions and modalities under which such an injunction can be granted. This lack of guidance has moved the ECJ, as Griffiths expresses it, to put some flesh on the bones of European IP enforcement.³³ The ECJ has shaped harmonised enforcement rules by requiring that, when the right to IP collides

²⁷ ECJ 12 July 2011, C-324/09, *L'Oréal v eBay*, para 137.

²⁸ ECJ 12 July 2011, C-324/09, *L'Oréal v eBay*, para 144.

²⁹ See E. Rosati, 'Intermediary IP Injunctions in the EU and UK Experiences: When Less (Harmonization) is More?' (2017) 3 *GRUR Int.* 206-215. The author mentions that the principle of effectiveness is to be read in conjunction with Recital 3 of the preamble of the Enforcement Directive.

³⁰ ECJ 12 July 2011, C-324/09, *L'Oréal v eBay*, para 139.

³¹ See Article 16, 11, 7 and 8 CFR.

³² As was the case in ECJ 24 November 2011, C-70/11, *Scarlet Extended* and ECJ 16 February 2012, C-360/10, *Netlog*.

³³ J. Griffiths, 'The Balancing Methodology' (CIPIL Annual Spring Conference 2017 – Intellectual Property and Human Rights, Cambridge, March 2017).

with other fundamental rights, a fair balance must be struck between the concurring rights.³⁴ The roots of the fair balance requirement will be dealt with in the subsequent paragraphs.

3. FAIR BALANCE – HOW IT CAME INTO BEING

3.1. *Roots of the balancing concept*

The requirement that a fair balance must be struck between conflicting fundamental rights is not a stand-alone concept, but a variant of the principle of proportionality.³⁵ This principle is an instrument that has its roots in German administrative law and is aimed at balancing conflicting interests.³⁶ Originally, it was used to challenge measures that were excessive or unnecessary to pursue a certain objective.³⁷ The notion was developed into a positive legal concept in other fields of law and, eventually, also beyond Germany.³⁸ As a result of this development, proportionality serves as a vital component of the constitutional model of many democracies.³⁹

The European Convention on Human Rights (ECHR) does not explicitly mention the principle of proportionality. Nevertheless, the European Court of Human Rights (ECtHR) has employed the requirement of a fair balance, along with the other components of proportionality, as instruments for reviewing the admissibility of human rights restrictions.⁴⁰ The ECtHR's analysis typically comes with a broad margin of appreciation, which grants the domestic authorities a measure of discretion as to how they protect and limit fundamental rights.⁴¹

It must be said that, while the principle of proportionality is clearly rooted in administrative law, balancing of rights can be found in various fields of law, including private law. For example, the doctrine of abuse of rights deals with the question whether a form of use or conduct is inappropriate. In this consideration, balancing of the pursued aim and the possible harm of this conduct is usually included.⁴² In the context of the prohibition of abuse of rights, which forms a general principle of EU law, the ECJ seems to have

³⁴ See the case law cited under note 5.

³⁵ A. Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: CUP 2012) 340 and 343-344; Oliver & Stothers (n 12) 546; Christoffersen (n 12) 35, see implicitly ECJ 22 January 2013, C-283/11, *Sky Österreich*, paras 50 et seq.

³⁶ See L. Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen: Schwarz 1981); R. Alexy (trans. Julian Rivers), *A Theory of Constitutional Rights* (Oxford: OUP 2002), A. Stone-Sweet & J. Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *CJTL* 75.

³⁷ P. Craig & G. De Búrca, *EU Law. Text, Cases, and Materials* (Oxford: OUP 2015) 551; J. Schwarze, *European Administrative Law* (London: Sweet & Maxwell 2006) 685-686.

³⁸ Barak (n 35) 180-181; J. Kokott, 'From Reception to Transplantation to Convergence of Constitutional Models in the Age of Globalization – With Particular Reference to the German Basic Law', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Berlin: Nomos Verlagsgesellschaft 1999) 71.

³⁹ V. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: OUP 2010) 60.

⁴⁰ See e.g. *Sporrong v. Sweden*, Appl. No. 7151/75, *EHRR* 35 (1982) para 69. See also Fischman Afori (n 2) 896-897.

⁴¹ See e.g. *Lawless v. Ireland*, Appl. No. 332/57 (1961) para 90; *Belgian Linguistic*, Appl. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 (1968) para 10; *Handyside*, Appl. No. 5493/72 (1976) para 48. Cf. J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2011) *ELJ* 80, 102; J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Martinus Nijhoff 2009) 233.

⁴² See A. Kjellgren, 'On the Border of Abuse – The jurisprudence of the European Court of Justice on circumvention, fraud and other misuses of community law', (2000) *European Business Law Review* 179-180.

acknowledged the relationship between proportionality and abuse of rights.⁴³ Specifically, in *Diamantis*, it held that the principle of proportionality serves as a prerequisite for the application of national provisions of abuse of rights, when the right in question is derived from EU law.⁴⁴

Notwithstanding the above, this article will focus on the principle of proportionality, as it forms the foundation of the balancing test as employed by the ECJ.

3.2. *Components of proportionality review*

Proportionality review consists of three or four steps. The initial step is formed by the legitimacy of the objective that is pursued, also known as the legitimate aim.⁴⁵ Traditionally, only a three-part test is used.⁴⁶ The three steps can be summarised as follows:

1. The principle of *suitability* means that the measure affecting the right must be suitable to achieve the pursued aim;
2. The principle of *necessity* means there is no other equally suitable measure available that is less restrictive to the right;
3. The principle of *proportionality in the narrow sense (stricto sensu)* means that the measure may not upset a fair balance between the conflicting rights and/or destroy the essence of the right that is restricted.⁴⁷

The principle of suitability focuses on the question whether the chosen measure is appropriate to pursue the legitimate objective.⁴⁸ In ECJ case law, this requirement is often referred to as the principle of appropriateness.⁴⁹ The notion presumes that a measure possesses a minimum degree of effectiveness, as an ineffective measure cannot benefit the pursued aim.⁵⁰

The principle of necessity is more complicated than that of suitability. First of all, the broadness of the principle differs depending on the legal system. The core of traditional necessity analysis is deploying the “least restrictive means test”, ensuring that the measure at hand does not restrict the right more than is necessary to achieve the objective.⁵¹ This interpretation is also known as the principle of strict necessity. It must be noted that, although it forms an essential part of the traditional three-tier proportionality analysis, the principle of strict necessity is not beyond dispute. For instance, the ECtHR has explicitly rejected the least restrictive means test in *James and Others v United Kingdom*, stating that the availability of alternative solutions only

⁴³ ECJ 12 March 1996, C-441/93, *Pafitis*, para. 67-70; ECJ 12 May 1998, C-367/96; *Kefalas*, para. 20-22; ECJ 23 March 2000, C-373/97, *Diamantis*, paras 33-34. See also A.S. Hartkamp, *European law and national private law* (Intersentia 2016) p 105-106 and 121-122.

⁴⁴ ECJ 23 March 2000, C-373/97, *Diamantis*, para 44. See I.V. Aronstein, ‘The principle of proportionality in legal relationships between private parties: its versatility and its bottlenecks’ in A.S. Hartkamp, C.H. Sieburgh & L.A.D. Keus (ed), *The influence of EU law on national private law*, (Wolters Kluwer 2014) p 251-269.

⁴⁵ W. Sauter, ‘Proportionality in EU Law: A Balancing Act?’ (2013) *CYELS* 448; Stone-Sweet & Mathews (n 37) 75.

⁴⁶ Christoffersen (n 41) 69-72; Stone-Sweet & Mathews (n 37) 76.

⁴⁷ Barak (n 35) 131-133, 243-338; Christoffersen (n 12) 19-20.

⁴⁸ Sauter (n 45).

⁴⁹ See Sauter (n 45) 9-10; ECJ 13 November 1990, C-331/48, *Fedesa*; cf. ECJ 27 March 2014, C-314/12, *UPC Telekabel*, Opinion of AG Cruz Villalón; ECJ 22 January 2013, C-283/11, *Sky Österreich* para 51 and 52.

⁵⁰ Christoffersen (n 12) 28.

⁵¹ Stone-Sweet & Mathews (n 36) 76.

“constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued”.⁵² This does not mean that the availability of less onerous alternatives is irrelevant, but it also does not impose a general obligation to employ the least restrictive measure.⁵³

The final step, proportionality *stricto sensu*, contains a balancing act. The term “balancing” has different meanings, depending on the legal context in issue. With regard to proportionality review, it can be explained as an analysis that places the purpose of the limiting law on the one side and the limited constitutional right on the other side, balancing the benefit gained by the purpose of the law with the harm caused by the right.⁵⁴ The outcome should establish a proper relation between the benefit that is gained by and the harm caused to the fundamental right.⁵⁵ The core of the fair balance requirement thus lies in finding a proper relationship through balancing, without destroying the essence of the right.

Although the principle of proportionality can be divided into different steps that can be used to delimit fundamental rights, these steps are often communicating vessels. For example, the consideration that a measure can only be deemed suitable by a small margin could have an effect on the review of the necessity standard as well as the assessment of proportionality *stricto sensu*. It can be assumed that such a measure will only pass the necessity test when its ineffectiveness is “compensated” by a pressing need, for instance because there are no other alternatives. In the same way, the effectiveness and restrictiveness of the measure, which are elements of the principles of suitability and necessity, are of influence of the final weighing of interests.

3.3. *Adoption of the balancing concept in copyright law*

The earliest example of the employment of a balancing test in EU copyright case law originates from *Metronome Music*, a judgment that pre-dates the CFR. In this case, the ECJ held that the freedom to pursue a trade and the right to property form “general principles of Community law”, which need to be viewed in relation to their social function.⁵⁶

With the entry into force of the 2001 Copyright Directive, the notion that rights should be weighed against each other became an integral part of copyright law. Recital 31 of the Directive formulates this explicitly, stating that:

“A fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter must be safeguarded”.⁵⁷

3.4. *The principle of proportionality and the EU Charter of Fundamental Rights*

The principle of proportionality forms a general principle of EU law, which

⁵² Christoffersen (n 12) 21-25. See also *James and Others v. United Kingdom* [PL] (21 February 1986, Series A. no. 98-B) para 51; *Hatton and Others v. United Kingdom* [GC] (8 July 2003, ECHR 2003-VIII) para 123.

⁵³ Christoffersen (n 12) 22.

⁵⁴ Barak (n 35) 343.

⁵⁵ Barak (n 35) 131.

⁵⁶ ECJ 28 April 1998, C-200/96, *Metronome Music*, para 21.

⁵⁷ Recital 31 of the Copyright Directive.

means it has constitutional status.⁵⁸ As a result, it is part of primary EU law, ranking equal to the treaties.⁵⁹ In written form, the principle of proportionality has been anchored in various EU legislative instruments.⁶⁰ An elaborate wording of the principle is enshrined in Article 52(1) CFR, which has been an instrument of EU law since its ratification in 2000.⁶¹ The provision, which deals with the scope of the rights guaranteed by the CFR, reads as follows:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Since the entry into force of the Charter, the ECJ has increasingly used the concept of a fair balance when determining the scope of the exclusive rights,⁶² interpreting and applying exceptions to copyright⁶³ and evaluating the permissibility of remedial measures.⁶⁴ However, unlike the ECtHR, the ECJ does not seem to rely on a general margin of appreciation doctrine.⁶⁵

4. FAIR BALANCE AS DELIMITATION OF COPYRIGHT INJUNCTIONS

As has been set out in the previous paragraphs, the ECJ has increasingly applied the principle of proportionality in EU copyright. This approach has proven to be particularly useful in lightly regulated areas, of which the field of copyright enforcement forms an example. This section will deal with the introduction of the condition of a fair balance by the ECJ as a tool to delineate copyright injunctions.

4.1. *Promusicae*

In the *Promusicae* case, the ECJ mentioned the balancing principle for the first time in relation to the demarcation of injunctions. The case revolved around the Spanish copyright holders' association Promusicae and access provider Telefónica. The key question was whether the right holder could ask for an injunction that would compel Telefónica to disclose identities and physical addresses of clients who were exchanging files through the peer-to-peer network KaZaA, infringing the rights of Promusicae.

A number of fundamental rights were in play. On the side of the copyright holder, the relevant provisions were Articles 17(2) and 47 CFR, which contain the right to protection of intellectual property and the right to an effective remedy.⁶⁶ Opposed to these rights were the right to privacy and data

⁵⁸ ECJ 15 October 2009, C-101/08, *Audiolux*, para 70.

⁵⁹ Hartkamp (n 43) p 95.

⁶⁰ For instance, article 3(2) of the 2004 Enforcement Directive explicitly states that, among other requirements, IP enforcement measures, procedures and remedies must be proportionate.

⁶¹ Albeit not legally binding until the entry into force of the Treaty of Lisbon in 2009; see note 6.

⁶² For example, see ECJ 8 September 2016, C-160/15, *GS Media*.

⁶³ See the case law cited under note 4.

⁶⁴ See the case law cited under note 5.

⁶⁵ For example, see ECJ 3 September 2008, C-402/05 P and 415/05 P, *Kadi and Al Barakaat v. Council*, para 41; cf. J. Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law' (2013) 38 *ELR* 70-71.

⁶⁶ ECJ 29 January 2008, C-275/06, *Promusicae*, para 61. See also ECJ 12 September 2006, C-479/04, *Laserdisken*, para 65; ECJ 12 July 2005, C-154/04 and C-155/04 *Alliance for Natural Health and Others*, para 126; ECJ 13 March 2017, C-432/05, *Unibet*, para 37.

protection (Articles 7 and 8 CFR respectively).⁶⁷ Various directives, under which the Data Protection Directive, the E-Privacy Directive, the E-Commerce Directive, the Copyright Directive and the Enforcement Directive, explicitly addressed these possible collisions.⁶⁸

The ECJ stated that, when implementing the directives mentioned above, the Member States must guarantee a fair balance between the right to intellectual property on the one hand and the right to privacy and data protection on the other hand. Also, when implementing the measures transposing the various directives, domestic authorities and courts will have to interpret national law in a manner consistent with these directives and with fundamental rights or other general principles, such as the principle of proportionality.⁶⁹ With this approach, the ECJ seeks to find a balance between relevant fundamental rights, without giving priority to any of those rights.⁷⁰

4.2. *Scarlet Extended and Netlog*

In the subsequent rulings *LSG* and *Bonnier Audio*, the ECJ confirmed the requirement of a fair balance, but refrained from providing guidelines that may help to determine whether this balance has been struck in a particular case.⁷¹ As a result, academic debate sparked concerning the substantiation of the notion.⁷²

In the twin judgments *Scarlet Extended* and *Netlog*, the ECJ engaged in a more detailed balancing exercise. Both cases revolved around the question whether an intermediary⁷³ could be ordered to install a filtering system that would monitor all data relating to customers in order to prevent copyright infringements. The right holders' fundamental right to intellectual property therefore had to be balanced against the freedom to conduct a business of the provider and the right to freedom of information and data protection of the users of the connection.⁷⁴

Before the balancing took place, the ECJ stated that it followed from *L'Oréal v eBay* that the proposed filtering system must observe the limitations arising from the Copyright Directive and the Enforcement Directive and from the

⁶⁷ ECJ 29 January 2008, C-275/06, *Promusicae*, para 63-64.

⁶⁸ Directive 95/46 (Data protection Directive), Directive 2000/31 (E-Commerce Directive), Directive 2001/29 (Copyright Directive) and directive 2004/48 (Enforcement Directive). See e.g. Oliver & Stothers (n 11) 554.

⁶⁹ ECJ 29 January 2008, C-275/06, *Promusicae*, para 68; cf. ECJ 6 November 2003, C-101/01, *Lindqvist*, para 87; ECJ 26 June 2007, C-305/05, *Ordre des barreaux francophones et germanophone and Others*, para 28.

⁷⁰ R.D. Chavannes, 'Belangenafweging in het informatierecht: het arrest Scarlet/SABAM en de botsing tussen auteursrecht en ondernemingsvrijheid, uitingsvrijheid en privacy' in M. Geus et al., *25 jaar Mediaforum. Een vooruitblik door de achteruitkijkspiegel* (Otto Cramwinckel 2013) 195.

⁷¹ ECJ 19 February 2009, C-557/07, *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten*, para 28-29; ECJ 19 April 2012, C-461/10, *Bonnier Audio*, para 56.

⁷² For example, see C.J. Angelopoulos, 'Sketching the Outline of a Ghost: The Fair Balance between Copyright and Fundamental Rights in Intermediary Third Party Liability' (2015) 17(6) *Journal of Policy, Regulation and Strategy for Telecommunications, Information and Media* 72-96; Griffiths (n 65) 70; C. Geiger & E. Izyumenko, 'Copyright on the Human Right's Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 *IIC* 316-342;; T. Mylly, 'The constitutionalization of the European legal order: Impact of human rights on intellectual property in the EU' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 103-131.

⁷³ The case of *Scarlet Extended* concerned an internet service provider, while in *Netlog* it regarded a hosting provider.

⁷⁴ ECJ 24 November 2011, C-70/11, *Scarlet Extended*, paras 42 and 50; ECJ 16 February 2012, C-360/10, *Netlog*, paras 40 and 48.

sources of law to which those directives refer.⁷⁵ Subsequently, the ECJ ruled that the presented measure would constitute a general monitoring obligation, which would violate Article 15(1) of the E-Commerce Directive.⁷⁶

The analysis could have ended there, as the general monitoring limitation clearly prohibits the injunction, leaving no room for a weighing-up of interests. Nevertheless, the ECJ continued to perform the balancing exercise, perhaps to provide guidance for the interpretation of subsequent cases. After all, *Scarlet Extended* and *Netlog* both concerned rather extreme measures where less intrusive alternatives were imaginable.⁷⁷

Subsequently, the ECJ held that the injunction in question “would result in a serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense.”⁷⁸ Such an obligation would be contrary to the conditions laid down in Article 3(1) of the Enforcement Directive, which states that measures should not be unnecessarily complicated or costly. The ECJ argued that in those circumstances, the proposed injunction would not satisfy the requirement of a fair balance between the opposing fundamental rights.⁷⁹

4.3. Legal uncertainty

The aforementioned judgments have been met with disapproval in academic literature. Authors argued that the balancing test, owing to its lack of substantiation by the ECJ, promotes legal uncertainty.⁸⁰ It has been frequently stated that the ECJ’s interpretation of the requirement of a fair balance offers little assistance as a guiding principle for delineating enforcement measures.⁸¹ This leads to courts, depending on the circumstances of the case, attempting to determine which fundamental right carries most weight and rule accordingly.⁸² Indeed, the ECJ seems to have offered little guidance as to the exact conditions that must be taken into account when balancing fundamental rights. If such guidance is not provided, the notion of a fair balance remains a “vague maxim.”⁸³ Legal uncertainty continues to exist, except maybe for intermediaries that find themselves in situations identical to the rulings in which the ECJ already prescribed the outcome of the required balancing.⁸⁴

It is hard to disagree with this critique, as the balancing in *Scarlet* and *Netlog* is indeed not very elaborate. On the other hand, it should also be clear that it cannot be expected of the ECJ to provide a structured test on the occasion of a few specific cases.⁸⁵ As Oliver and Stothers correctly state, “case law is a blunt instrument for deciding such complicated multi-faceted issues”. In addition, the ECJ could risk being accused of entering areas that should be left to the

⁷⁵ ECJ 12 July 2011, C-324/09, *L’Oréal/eBay*, para 138.

⁷⁶ ECJ 24 November 2011, C-70/11, *Scarlet Extended*, para 40; ECJ 16 February 2012, C-360/10, *Netlog*, para 38.

⁷⁷ See Savola (n 24) 120.

⁷⁸ ECJ 24 November 2011, C-70/11, *Scarlet Extended*, para 48.

⁷⁹ ECJ 24 November 2011, C-70/11, *Scarlet Extended*, para 49; ECJ 16 February 2012, C-360/10, *Netlog*, para 39.

⁸⁰ See for example A. Peukert, ‘The Fundamental Right to (intellectual) property’ in C. Geiger (ed), *Human Rights and Intellectual Property* (Edward Elgar 2015) 135; Angelopoulos & Smet (n 16).

⁸¹ Griffiths (n 65) 69.

⁸² Angelopoulos & Smet (n 16) 275.

⁸³ Griffiths (n 65) 65.

⁸⁴ This seems to be highly theoretical, however, especially since an outcome prohibition is a rare instrument in itself.

⁸⁵ Oliver & Stothers (n 11) 547.

legislator.

5. SUBSTANTIATION OF THE PROPORTIONALITY TEST

It can be inferred from its case law that the ECJ has been gradually developing the concept of a fair balance from an open-ended test into a structured limitation instrument, grounded on the principle of proportionality. This section will deal with the relevant judgments that have substantiated the required proportionality test.

5.1. *Sky Österreich*

In the aforementioned judgments, the ECJ refrained from a detailed analysis of the requirement of a fair balance. However, it has acknowledged that the principle of proportionality, in the form of a general principle of EU law, is of importance in such cases.⁸⁶ The *Sky Österreich* judgment could provide an example of a more thorough examination of this principle. In this ruling, the ECJ engaged in an extensive proportionality review to find an appropriate balance between the fundamental rights in question.⁸⁷

An aspect of this case concerned the compatibility a provision of the Audiovisual Media Services Directive with the freedom to conduct a business of the holder of exclusive broadcasting rights. Article 14 of the Directive authorised Member States to take measures that prevent the right holder from broadcasting on an exclusive basis on events which are regarded by that Member State as being of major importance for society in such a way that would deprive a substantial proportion of the public of the possibility of following such events by live coverage or deferred coverage on free television.⁸⁸ Subsequently, Article 15(1) of the Directive required Member States to ensure that other broadcasters would be allowed to make short news reports of events of high interest to the public. Finally, Article 15(6) of the Directive stated that, where the compensation is provided for the right holder, it shall not exceed the additional costs directly incurred in providing access to the signal.⁸⁹

In this case, Austrian commercial broadcaster Sky Österreich (Sky) acquired the exclusive rights to air Europa League football matches in Austrian territory from the Austrian communications regulator, KommAustria. For the purposes of producing short news reports, an agreement was reached between Sky and public broadcaster Österreichischer Rundfunk (ORF), allowing the latter to broadcast summarised reports of these matches.

At the request of ORF, KommAustria decided that Sky was required to grant ORF the right to produce short news reports. However, Sky was not entitled to demand remuneration greater than the additional costs directly incurred in providing access to the satellite signal, which were practically non-existent. Simultaneously, it determined the conditions under which ORF could exercise that right. Both parties appealed against this decision before the Federal Communications Senate (*Bundeskommunikationssenat*, the Senate), Austria's highest broadcasting authority.

⁸⁶ See ECJ 29 January 2008, C-275/06, *Promusicae*; ECJ 24 November 2011, C-70/11, *Scarlet Extended*; ECJ 16 February 2012, C-360/10, *Netlog*.

⁸⁷ ECJ 22 January 2013, C-283/11, *Sky Österreich*.

⁸⁸ Art. 14 Audiovisual Media Services Directive.

⁸⁹ ECJ 22 January 2013, C-283/11, *Sky Österreich*, para 32.

The Senate questioned whether a provision of a directive which prevents the authorities of a Member State from providing for compensation would be an interference consistent with the principle of proportionality as enshrined in Article 52(1) CFR. In those circumstances, it referred to the ECJ the question whether the aforementioned provisions were compatible with Articles 16 and 17 CFR.

With regard to Article 16 CFR, the ECJ held that the freedom to conduct a business is not absolute, but that it should be viewed in relation to its social function. As a result, the right may be subject to limitations by means of an intervention on the part of public authorities. This is reflected in the way the principle of proportionality, as laid down in Article 52(1) CFR, must be implemented.⁹⁰

The ECJ consequently engaged in a thorough review of the Article 52(1) CFR. As to the principle of proportionality, it recalled that, according to settled case law, the principle requires that “measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question”.⁹¹ When multiple appropriate measures are available, recourse must be taken to the least onerous, whereas the disadvantages caused by this measure must not be disproportionate to the aims pursued.⁹² The first part of this sentence deals with the principles of suitability and necessity, while the second part refers to the principle of proportionality *stricto sensu*.

The ECJ’s assertion that, when several appropriate measures are at hand, the least onerous remedy must be chosen, is remarkable. This phrasing seems to suggest that, as opposed to the ECtHR, the ECJ deploys a strict necessity test. Regardless of the underlying objective, it is up for discussion whether a “least restrictive measure” can be determined indisputably. It would seem that such an examination inherently brings a certain room for manoeuvre for judicial authorities.

In its examination of the proportionality in the narrow sense of the measure, the ECJ weighed the disadvantages resulting from the provision against the benefits of the pursued aim, concluding that a fair balance has been struck between the directive provisions and the freedom to conduct a business.⁹³

It must be said that the circumstances of the *Sky Österreich* judgment are different from the aforementioned cases, as it concerned a form of legality review of a directive provision and not a resolution of two concurring fundamental rights. Nevertheless, the method used by the ECJ can be used as a blueprint to resolve conflicts between fundamental rights that arise when copyright holders seek an injunction against intermediaries.

5.2. *UPC Telekabel*

Arguably, the *UPC Telekabel* judgment forms the first example of detailed proportionality review in a case about an injunction against an intermediary. The case concerned an Austrian ISP called UPC Telekabel. The right holders,

⁹⁰ ECJ 22 January 2013, C-283/11, *Sky Österreich*, para 45-47.

⁹¹ ECJ 22 January 2013, C-283/11, *Sky Österreich*, para 50.

⁹² ECJ 22 January 2013, C-283/11, *Sky Österreich*, para 50. See ECJ 8 July 2010, C-343/09 *Afton Chemical*, para 45, and ECJ 23 October 2012, C-581/10 and C-629/10, *Nelson and Others*, para 71; ECJ 12 March 2002, C-27/00 and C-122/00, *Omega Air and Others*, para 62; ECJ 12 January 2012, C-504/04, *Agrarproduktion Staebelow*, para 35.

⁹³ ECJ 22 January 2013, C-283/11, *Sky Österreich*, para 67.

film producers Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH, demanded the blocking of access to the website *kino.to*, which provided a large amount of copyrighted material.

The essential question was whether an injunction that constitutes an “outcome prohibition” would be allowed under EU law. Such an obligation would require the intermediary to take all necessary measures in order to prevent a certain outcome. In this case, UPC Telekabel would be prohibited from allowing customers to access a website placing a protected subject-matter online, without the agreement of the right holders. Moreover, the injunction would not specify the measures that the access provider must take.

The ECJ repeated its considerations in the earlier case of *Promusicae*, stating that, when different fundamental rights are at stake, national authorities must strike a fair balance between the applicable rights.⁹⁴ In this case, two balancing acts were required. First of all, it had to be established whether an outcome prohibition would be capable of achieving a fair balance between the copyright and/or related rights (Article 17(2) CFR) on the one hand, and the intermediary’s right to conduct a business (Article 16 CFR) on the other. Subsequently, a balancing of interests needed to take place between, again, the copyright and/or related rights and the right to freedom of information of the users (Article 11 CFR).⁹⁵ These balancing tests will be described below.

5.2.1. *Right to IP – freedom to conduct a business*

With regard to the first balancing act, the ECJ ruled that an outcome prohibition does not violate the necessary fair balance between the right holders’ right to intellectual property and the ISP’s freedom to conduct a business:

“An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions.

However, such an injunction does not seem to infringe the very substance of the freedom of an internet service provider such as that at issue in the main proceedings to conduct a business.”⁹⁶

In addition, it can be inferred from these grounds that the substance of the fundamental right is instrumental in the examination of the fair balance. This “core rights approach” can also be found in the trade mark case *Coty Germany*.⁹⁷ Apparently, the required balancing must also be exercised in accordance with Article 52(1) of the Charter. This provision explicitly states that:

“any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.”

Measures that affect the substance (or essence⁹⁸) of this right do not meet the

⁹⁴ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 46.

⁹⁵ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 47.

⁹⁶ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, paras 50-51.

⁹⁷ ECJ 16 July 2015, C-580/13, *Coty Germany*.

⁹⁸ See ECJ 15 September 2016, C-484/14, *McFadden*, where the Court spoke of the ‘essence’ rather

requirements of a fair balance.

The necessity criterion also shines through in the considerations of the ECJ that the measure at hand respects the essence of the freedom to conduct a business, because it allows the ISP to choose the measures to be taken in order to achieve the result sought, and the possibility of exoneration when the obligation would lead to unbearable sacrifices.⁹⁹

5.2.2. *Transferring the balancing exercise*

Interestingly, the ECJ did not simply proceed to the required second balancing method. Instead, it transferred this task to the intermediary:

“None the less, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.”¹⁰⁰

The burden of balancing fundamental rights now rests on the intermediary. Accordingly, the need to strike a fair balance is no longer solely the responsibility of national authorities, but also of the intermediary. This supervisory shift is atypical for fundamental rights’ protection, as traditionally the state is charged with protecting fundamental rights.¹⁰¹

Some authors suggest that this outcome is merely a result of the unusual circumstances of the *UPC Telekabel* case, specifically because of the peculiar nature of “outcome prohibitions”, and should not be read as a general imposition of fundamental rights duties on intermediaries.¹⁰² A counter-argument can be made by pointing to Recital 59 of the Copyright Directive, which states that intermediaries are best placed to bring infringing activities to an end. Following this line of thinking, the intermediary could be the designated party to decide which measures should be taken.¹⁰³

It has been contended that shifting the balancing exercise to intermediaries is desirable. Though intermediaries might be best placed to bring infringements to an end, they certainly are not best placed to balance fundamental rights.¹⁰⁴ Angelopoulos argues that judges are much more familiar with the substance of the different fundamental rights and are therefore best equipped to perform the complicated balancing exercise. Moreover, as the author puts it, “internet service providers have no real way of knowing what is and what is not “reasonable” in the eyes of the law.”¹⁰⁵ This means that the outcome of the weighing exercise would become even more unforeseeable, which would lead to even more legal uncertainty.¹⁰⁶

than the ‘substance’ of the right, while directly referring to *UPC Telekabel*.

⁹⁹ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, paras 52-53.

¹⁰⁰ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 55.

¹⁰¹ D.J. Harris et al., *Law of the European Convention on Human Rights* (Oxford: OUP 2014) 23; Angelopoulos & Smet (n 16) 277.

¹⁰² Cf. Savola (n 24) 120; Angelopoulos & Smet (n 16) 277.

¹⁰³ Angelopoulos & Smet (n 16) 277.

¹⁰⁴ Geiger & Izyumenko (n 14) 93.

¹⁰⁵ C.J. Angelopoulos, ‘Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape’ (2014) 9 *Journal of Intellectual Property Law and Practice* 819.

¹⁰⁶ A different problem, which is of a more formal nature, lies in the timing of the review. See ECJ 27 March 2014, C-314/12, *UPC Telekabel*, Opinion of AG Cruz Villalón. The AG stated that, according to CJEU case law, the balance between fundamental rights must be observed when the injunction is issued. In the case of an outcome prohibition, this balance is examined at a later stage, which

In my opinion, this argument is not fully convincing. While it may be true that judges are more familiar with constitutional analysis, it could also be argued that intermediaries are in a better position to evaluate what possible measures can be taken and to understand and predict the effect of said measures. In addition, the ECJ has developed clear standards to which the intermediary must adhere in this assessment. On the one hand, the ISP must take all reasonable measures to prevent users from illegally accessing the copyrighted works. On the other hand, he must ensure that these measures do not unnecessarily deprive internet users of their rights.¹⁰⁷ The next section will deal with the substantiation of these duties.

Furthermore, the ECJ has provided an additional safeguard with regard to the protection of the freedom of information. It ruled that national judges must be able to verify if the measures chosen by the intermediary are capable of striking the required balance. Therefore, national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.¹⁰⁸ This creates the opportunity for users to invoke their fundamental rights and base their claim on these rights.¹⁰⁹

5.2.3. *Right to IP – freedom of information*

Even though the ECJ refused to perform the second balancing exercise itself, it did provide the conditions under which this review must take place. The ECJ interpreted the requirement of a fair balance in the context of Article 52(1) Charter, which includes the principle of proportionality.¹¹⁰

Legitimate aim

The ECJ held that the measures adopted by the ISP must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.¹¹¹ From this wording, it follows that the measure must be aimed at blocking content that has been made available *illegally* in order to be deemed legitimate.

Suitability

The suitability assessment can be deduced from the ECJ's consideration that measures taken by the addressee must be sufficiently effective to ensure genuine protection of the fundamental right at issue'.¹¹² After all, suitability focuses on the relationship between means and ends.¹¹³ This requires a minimum degree of effectiveness in order to secure that the protected interest is not outweighed by its counter-weighting interests.¹¹⁴

motivated the AG to conclude that an outcome prohibition would be in breach of the rule of a fair balance.

¹⁰⁷ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 66.

¹⁰⁸ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 57.

¹⁰⁹ Also referred to as *locus standi*. See Geiger & Izyumenko (n 14) 56; Savola (n 24) 121.

¹¹⁰ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 63.

¹¹¹ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 56.

¹¹² ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 62-63.

¹¹³ Christoffersen (n 12) 29.

¹¹⁴ Christoffersen (n 12) 28.

The ECJ stated that the proposed measures should, at minimum,

“have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right.”¹¹⁵

The considerations regarding the required effectiveness of blocking measures have led to discussion. Synodinou has argued that two of the most important variants, domain name server blocking (DNS-blocking)¹¹⁶ and IP address blocking¹¹⁷, are both likely to fail the effectiveness test, as these measures are said to have the disadvantage of being easy to circumvent and to carry high risks of ‘over-blocking’ (blocking of legal content).¹¹⁸ Methods that could prove to be effective, such as deep packet inspection (DPI)¹¹⁹, could in their turn fall within reach of Article 15 of the E-Commerce Directive, which prohibits obligations of general monitoring.

On the other hand, it cannot be expected that the above-mentioned blocking measures are capable of leading to a complete cessation of infringements, which has also made explicit by the ECJ.¹²⁰ This does not preclude the denial of injunctive relief, which could be the case when there are more fitting solutions or if the measure would lead to an imbalance between means and ends. However, as far as the standard of effectiveness goes, the threshold should not be set unnecessarily high.¹²¹

Furthermore, it should be pointed out that the possibility of circumvention and effectiveness are not as directly correlated as is suggested. In his opinion on *UPC Telekabel*, Advocate General Cruz Villalón rightly stated that, while it may be true that some consumers will take advantage of the possibility to circumvent, it is also safe to assume that some users, after being notified of the illegal nature of the website, will not continue to search for alternative sources. In the opinion of the Advocate General, it would, therefore, be inadmissible to assume that every user is willing to commit (further) infringements when the opportunity is given.¹²² It would be even more incorrect to consider the possibility of circumvention a deciding factor the assessment of the effectiveness standard. In the British case *Cartier*, Arnold J rightly held that allowing such a defence would “not only undermine intellectual property rights, it would also be inimical to the rule of law.”¹²³

¹¹⁵ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 62-63.

¹¹⁶ The method of DNS blocking is commonly used to block websites. The ISP deletes the address from its DNS server, which makes it impossible for the user to access the site (without circumventions).

¹¹⁷ This method is self-explanatory: it targets the IP address of the user, blocking access to certain websites for everyone that uses this IP address.

¹¹⁸ T.-E. Synodinou, ‘Intermediaries’ liability for copyright infringement in the EU: Evolutions and confusions’ (2015) 31 *Computer Law & Security Review* 62.

¹¹⁹ Deep Packet Investigation encompasses a more complex form of control, which investigates if communication that is travelled is illegal. See for an in-depth analysis T. Margoni & M. Perry, ‘Deep Pockets, Packets, and Harbors’ (2013) 74 *Ohio State Law Journal* 1196-1215.

¹²⁰ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 58-61.

¹²¹ See also *EMI Records Ltd and others v British Sky Broadcasting Ltd and others*, [2013] EWHC 379 (Ch) [104].

¹²² ECJ 27 March 2014, C-314/12, *UPC Telekabel*, Opinion of AG Villalón, para 100.

¹²³ See *Cartier International v. British Sky Broadcasters* [2014] EWHC 3354 (Ch), upheld in: [2016] EWCA Civ 658. See also: [2018] UKSC 28.

Necessity

The considerations on the necessity test remained brief. The ECJ held that, in order to comply with Article 52(1) CFR, measures must not unnecessarily deprive internet users of the possibility of lawfully accessing the information available.¹²⁴

It is not entirely clear whether this phrasing suggests that no strict necessity test is required. It seems that, as long as there is no unnecessary deprivation of lawful access, the measure passes the necessity test. In this case, it has to be examined whether the public can still have access to the information available, which also infers that the essence of the right must be left intact. A similar interpretation of necessity is also found in ECtHR case law.¹²⁵

Proportionality stricto sensu

The ECJ does not proceed to a detailed assessment of proportionality *stricto sensu*.¹²⁶ Instead, it held that a fair balance is struck, in accordance with Article 52(1) CFR, when the requirements it set out before have been fulfilled.¹²⁷ This clarifies that full proportionality analysis is required when an injunction is capable of restricting multiple fundamental rights.

In the end, the weighing of interests remains short on specifics.¹²⁸ Such an approach was to be expected though, as the case concerned an outcome prohibition, an injunction that is non-specific to begin with.¹²⁹

5.3. McFadden

In *McFadden*, the ECJ ruled on the admissibility of three specific measures against Tobias McFadden, an operator of an open wireless network (hereafter: open WiFi). McFadden ran a business selling and leasing lighting and sound systems and operates an open (not password-restricted) and free-of-charge wireless local area network, on which customers could login without having to reveal their identity. After an anonymous person used the network to illegally download protected works, McFadden received formal notice from right holder Sony Music, informing him of the copyright infringement. In an unusual turn of events, McFadden took the right holder to court and asked for a negative declaratory action (*negatieve Feststellungsklage*). The right holder reacted with a counterclaim, asking for damages, an injunction against the infringement of its rights and reimbursement of the costs of formal notice, as well as court costs.

The German court dismissed McFadden's claims, upholding the counterclaims of Sony Music. McFadden appealed the judgment, claiming that he could not be held liable for the alleged infringement as he was exempted from liability under the provisions of the German law transposing the mere conduit-exemption of Article 12(1) of the E-Commerce Directive. In the appeal proceedings, Sony Music stated that McFadden should nevertheless be held liable in accordance with the case law on indirect liability (*Störerhaftung*) of

¹²⁴ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 63.

¹²⁵ Christoffersen (n 12) 22-25.

¹²⁶ The Court already held that the essence of all rights must remain unharmed. See ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 51 (freedom to conduct a business) and para 63 (freedom of information).

¹²⁷ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 62-33.

¹²⁸ See also: Mylly (n 72) 121.

¹²⁹ Oliver & Stothers (n 11) 557.

WiFi operators.¹³⁰

The ECJ made quick work of this argument. It ruled that the mere conduit exemption also applied to the services provided by McFadden.¹³¹ As a result, Sony could not ask for damages, as the applicability of the safe harbour implies that recourse against intermediaries is not permitted.¹³²

The focus of the case therefore was on the proposed remedies. As has already been explained in section 2, the applicability of the safe harbour does not preclude the right holder from seeking an injunction against an intermediary in order to prevent or end infringements.¹³³ In the present case, the referring court already formulated three possible measures that could be taken against an operator of an open WiFi-network.¹³⁴

The measures at hand consisted of 1) monitoring all information passing through an internet connection, 2) terminating the internet connection or 3) password-protecting it.

5.3.1. *Monitoring information*

The ECJ firmly dismissed the first measure. It held that such an injunction containing a duty to monitor all information would be incompatible with Article 15 of the E-Commerce Directive, as it imposed a general and absolute obligation.¹³⁵ As a consequence, there was no need for balancing.

5.3.2. *Termination of the internet connection*

As there were no absolute restrictions that outright forbade the remaining measures, the ECJ proceeded to the weighing of interests. Starting with the second measure, which contained an obligation to terminate the internet connection, the ECJ balanced the freedom to conduct a business of McFadden against the right to intellectual property of Sony Music:

“As regards, second, the measure consisting in terminating the internet connection completely, it must be found that so doing would cause a serious infringement of the freedom to conduct a business of a person who pursues an economic activity, albeit of a secondary nature, consisting in providing internet access by categorically preventing that provider from pursuing the activity in practice in order to remedy a limited infringement of copyright without considering the adoption of measures less restrictive of that freedom.

In those circumstances, such a measure cannot be regarded as complying with the requirements of ensuring a fair balance is struck between the fundamental rights which must be reconciled (see, to that effect, as regards an injunction, judgment of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, paragraph 49, and, by analogy, judgment of 16 July 2015, *Coty Germany*, C-580/13, EU:C:2015:485, paragraphs 35 and 41).”¹³⁶

As has been set out before, the proportionality test requires that the essence of

¹³⁰ See BGH 12 May 2010, I ZR 121/08, *Sommer unseres Lebens*, in which the German Bundesgerichtshof ruled that a private person that exploits a wifi-network can be held indirectly liable when that person does not protect the network using password control, offering the opportunity to third parties of infringing protected works.

¹³¹ ECJ 15 September 2016, C-484/14, *McFadden*, paras 41-42.

¹³² ECJ 15 September 2016, C-484/14, *McFadden*, paras 73-75 and 79.

¹³³ ECJ 12 July 2011, C-324/09, *L'Oréal/eBay*, para 144.

¹³⁴ In fact, the Court envisaged that these measures were, in practice, the only measures that could be taken.

¹³⁵ ECJ 15 September 2016, C-484/14, *McFadden*, para 87.

¹³⁶ ECJ 15 September 2016, C-484/14, *McFadden*, paras 88-89.

the right remains intact. Remarkably, the ECJ seems to have grounded its decision on the reasoning that termination would be unacceptable when there are less intrusive measures left unconsidered. In these circumstances, the proposed measure did not comply with the requirements of ensuring a fair balance between fundamental rights.¹³⁷

5.3.3. Password and identification

The ECJ proceeded to the evaluation of the third remedy, consisting of an obligation on the WiFi-operator to password-protect the WiFi connection. First of all, the ECJ signalled two possible fundamental rights conflicts, as the measure at hand was capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service.¹³⁸

Similar to the *UPC Telekabel* judgment, the ECJ dealt with these conflicts one by one, starting with the possible restriction of the freedom to conduct a business. However, contrary to the aforementioned ruling, the ECJ did not shift the second balancing task to the intermediary, but instead chose to perform the task itself. This might indicate that the ECJ intended no general shift of proportionality assessment.¹³⁹

5.3.3.1. Right to IP – freedom to conduct a business

In line with earlier judgments, the ECJ assessed whether the essence of the right to conduct a business of the WiFi-provider is damaged. It held that this was not the case, as long as the measure is limited to marginally adjusting one of the technical options open to the provider in exercising its activity.¹⁴⁰ Under these conditions, the ECJ ruled that a fair balance was struck between the right to IP and the right to conduct a business.

5.3.3.2. Right to IP – freedom of information

The other elements of the principle of proportionality are discussed in light of the limitation of the freedom of information of the users of the connection.

Legitimate aim

As to the legitimate aim of the proposed measure, the ECJ repeated the criteria set out in *UPC Telekabel*, stating that the measure adopted must be strictly targeted, in the sense that it must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting the possibility of internet users lawfully accessing information using the provider's services. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.¹⁴¹ This confirms that the requirements set out in *UPC Telekabel*, notwithstanding its unique characteristics, are applicable to different kinds of remedies against intermediaries.

Next, the ECJ held that a password-lock does not conflict with the objective pursued by the measure, as such technical restrictions do not form a true

¹³⁷ ECJ 15 September 2016, C-484/14, *McFadden*, para 88.

¹³⁸ ECJ 15 September 2016, C-484/14, *McFadden*, para 90.

¹³⁹ At least not when specific measures are in question.

¹⁴⁰ ECJ 15 September 2016, C-484/14, *McFadden*, paras 91-92.

¹⁴¹ ECJ 15 September 2016, C-484/14, *McFadden*, para 93; ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 56.

blockage of internet access. Therefore, an obligation to password-protect the connection does not affect the possibility of internet users to lawfully access information.¹⁴²

Suitability

The next step is the assessment of the suitability requirement. As has been set out before, the effectiveness standard requires that the measure must be able to, at least, make it difficult for users to infringe copyright or seriously discourage them from doing so.¹⁴³ The ECJ ruled that a password restriction meets this standard, provided that users of the connection are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.¹⁴⁴

This is a surprising outcome, as the referring court did not specify a need for identification. This prerequisite could nevertheless have far-reaching consequences, as most operators do not require actual proof of identity, or do not ask for identification at all.¹⁴⁵

Necessity

Before the ECJ moved on to the necessity standard, it recalled that, according to the referring court, there were only three measures the operator could take in order to comply with an injunction.¹⁴⁶ Departing from this assumption, the ECJ considered the following:

“Since the two other measures have been rejected by the Court, to consider that a communication network access provider need not secure its internet connection would thus be to deprive the fundamental right to intellectual property of any protection, which would be contrary to the idea of a fair balance (see, by analogy, judgment of 16 July 2015, *Coty Germany*, C-580/13, EU:C:2015:485, paragraphs 37 and 38).

In those circumstances, a measure intended to secure an internet connection by means of a password must be considered to be necessary in order to ensure the effective protection of the fundamental right to protection of intellectual property.”¹⁴⁷

The brief assessment of the necessity standard can be explained by the assumption that password-restriction was the only remedy left imaginable. On this assumption, and provided that it passes the effectiveness test, the measure almost automatically fulfils the necessity criterion, as there are no other (be it equally suitable or less restrictive) measures available. The ECJ finds password-locking necessary in the most basic meaning of the word, as it is truly indispensable as a means of protection.

Of course, it remains to be seen if the measures as referred to by the German court were indeed the only options in this case. If the ruling is interpreted as saying that password-locking is a last resort measure, pointing to other acceptable measures could form a defence for the intermediary.¹⁴⁸

¹⁴² ECJ 15 September 2016, C-484/14, *McFadden*, para 94.

¹⁴³ ECJ 27 March 2014, C-314/12, *UPC Telekabel*, para 62.

¹⁴⁴ ECJ 15 September 2016, C-484/14, *McFadden*, para 96.

¹⁴⁵ See also: M. Husovec, ‘Holey cap! ECJ drills (yet) another hole in the e-Commerce Directive’s safe harbours’ (2017) 12 *Journal of Intellectual Property Law & Practice* 122.

¹⁴⁶ ECJ 15 September 2016, C-484/14, *McFadden*, para 97.

¹⁴⁷ ECJ 15 September 2016, C-484/14, *McFadden*, paras 98-99.

¹⁴⁸ Husovec (n 146) 123.

Proportionality stricto sensu

In its previous considerations, the ECJ already established that the essence of the right to freedom of information have been left intact:

“In the second place, a measure consisting in securing an internet connection does not appear to be such as to undermine the essence of the right to freedom of information of the recipients of an internet network access service, in so far as it is limited to requiring such recipients to request a password, it being clear furthermore that that connection constitutes only one of several means of accessing the internet.”¹⁴⁹

In addition, as the ECJ presumed password-locking to be the only suitable remedy left, refusing the right holder this remedy would be contrary to a fair balance.¹⁵⁰

Taking into account the aforementioned paragraphs, the ECJ concluded that, under the conditions set out in its judgment, a measure consisting in securing a connection must be considered to be capable of striking a fair balance between, first, the fundamental right to protection of intellectual property and, second, the right to freedom to conduct the business of a provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service.¹⁵¹ This fulfils the final requirement, i.e. proportionality in the narrow sense.

The *McFadden* judgment has given some additional guidelines for performing the balancing exercise. It is of primary importance that fundamental rights are not restricted in such a manner that the essence of these rights is violated. If this is not the case, the benefits of the pursued aim are outweighed by the harm done to conflicting fundamental rights. When the essence of the right is left intact, depriving the right holder of a remedy would be contrary to a fair balance.¹⁵² The remedies at hand, however, must bring merit to the right holder, which should already follow from the assessment of suitability and necessity. In this sense, the assessment of fair balance between the rights is always connected to the other conditions stated by the principle of proportionality.

The ruling also brings substantive consequences for the possibility of monetary claims against intermediaries, as well as allowing password-locking throughout the EU. Husovec is critical of the judgment, arguing that the ECJ's acceptance of password-locking is “short-sighted, but understandable given the (referring – PT) court's framing of the problem.”¹⁵³ Furthermore, as has been pointed out before, the right to privacy and the right to data protection have been omitted from the balancing test. This balancing should have been part of the equation, as both rights can be affected as a consequence of the identification that is required by the measure. Lastly, it seems to follow from this case that the presumed shift of enforcement burdens does not apply to specific measures, which should bring some relief to intermediaries throughout the EU.

¹⁴⁹ ECJ 15 September 2016, C-484/14, *McFadden*, para 92.

¹⁵⁰ ECJ 15 September 2016, C-484/14, *McFadden*, para 98.

¹⁵¹ ECJ 15 September 2016, C-484/14, *McFadden*, para 100.

¹⁵² ECJ 15 September 2016, C-484/14, *McFadden*, para 99.

¹⁵³ Husovec (n 146) 125.

5.4. *Methods of proportionality review*

It has been argued that the balancing method is inappropriate when weighing the right to property against other fundamental rights, because it rests on the assumption that all fundamental rights are equal. Peukert states that this assumption disregards that the right to property (in general and in the form of IP) is fundamentally different from other individual rights and freedoms.¹⁵⁴ He substantiates his position as follows. As opposed to individual freedoms, the right to property only guarantees the existence and enjoyment of *lawfully acquired possessions*, which means they should have a sufficient basis in national law. As a result, IP rights are the outcome of democratic decision-making. Because of this structure, conflicts between the right to (intellectual) property and other freedoms should not be resolved using a balancing test.¹⁵⁵

Peukert argues that, instead, courts should determine whether IP rights interfere with fundamental freedoms or the other way around. For instance, creation and expansion of IP rights by the legislature encroaches on the public domain and would therefore have to be justified in light of other fundamental rights and freedoms. It is my understanding that the same applies to injunctions against intermediaries, as long as they are able of interfering with multiple fundamental rights and freedoms and do not have an explicit legal basis. After the creation of IP legislation, any control of use would constitute a deprivation of the right to property. For this reason, the limitation of existing IP rights must be justified in light of the right to property. This technique essentially entails a justification method, based on a hierarchy of legal norms, rather than a balancing of fundamental rights presuming they are equal. The justification method is grounded on full proportionality analysis, which is an established practice in constitutional courts.¹⁵⁶

Collins, on the other hand, argues that there should be a weighing on an equal footing when fundamental rights – the right to property included – collide in private spheres. The author argues that courts should employ a “double” proportionality test to assess whether the restrictions on both fundamental rights can be justified in the light of the principle of proportionality.¹⁵⁷

It seems to follow from *UPC Telekabel* and *McFadden* that the ECJ resolves fundamental rights conflicts by employing full proportionality analysis. In its analysis, the ECJ assesses whether limitations on the rights that oppose the right to IP can be justified in the light of the principle of proportionality. The balancing of rights is an important instrument of the ECJ’s analysis, but other elements of the proportionality are also applied. In this consideration, interests of all parties involved are taken into account.

One must be careful not to infer from these cases that the opposing fundamental rights are somehow prioritised over the right to IP. There is no indication that the ECJ acknowledges a hierarchy when it comes to fundamental rights. On the contrary: it has repeatedly stated that the right to intellectual property and other fundamental rights have to be balanced against each other, which implies their equality.¹⁵⁸ It seems more likely that the ECJ

¹⁵⁴ Peukert (n 80) 135.

¹⁵⁵ Peukert (n 80) 139.

¹⁵⁶ Peukert (n 80) 140.

¹⁵⁷ H. Collins, ‘On the (In)compatibility of Human Rights Discourse and Private Law’, (2012) 7 *LSE Law, Society and Economy Working Papers* 29-32.

¹⁵⁸ C. Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’, 37 (2006) *International Review of Intellectual*

is merely interpreting the relevant directives, which in this case provide the right holder a certain remedy, in accordance with the Charter.

6. FUNDAMENTAL RIGHTS AS STRATEGIC INSTRUMENTS

It has been argued that the ECJ has been strategically applying fundamental rights to further certain goals.¹⁵⁹ For instance, Mylly points out that the ECJ has been selective when referring to fundamental rights. This occurs when the ECJ only refers to certain fundamental rights if their interpretation leads to the desired result. To promote this outcome, the ECJ may even ignore certain fundamental rights in its analysis.¹⁶⁰

An example of this can be found in the *McFadden* judgment, where the ECJ ruled that an injunction obligating an operator of a free Wifi-network to password-protect the connection “may dissuade the users of that connection from infringing copyright or related rights, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which is for the referring court to ascertain.”¹⁶¹ This wording indicates that mandatory identification of the users of the network is necessary. It seems obvious that in such cases, the right to privacy and data protection of the users (Article 7 and 8 CFR) should be taken into account.¹⁶² The ECJ nevertheless left these fundamental rights out of the equation entirely. It only referred to the right to conduct a business of the WiFi-operator and the right to freedom of information of the internet users, concluding that the essence of both rights has been left intact.¹⁶³ On the basis of this weighing of interests, the ECJ ruled that the aforementioned measure is capable of striking a fair balance. However, it appears self-evident that there can be no such balance when some fundamental rights have been overlooked.

In general, the ECJ seems to have essentially promoted the advancement of harmonisation of EU law.¹⁶⁴ By referring to fundamental rights the ECJ seems to have regulated situations not previously thought to be covered by the *acquis*.¹⁶⁵ The case law on injunctions against intermediaries is a striking example of the strategic potential fundamental rights possess.

7. CONCLUSION

Within the area of IP enforcement, the ECJ seems to have gradually embraced the principle of proportionality as an instrument for the review of remedial measures. The early rulings *Promusicae*, *Scarlet* and *Sabam* are poignant examples of judgments that have promoted legal uncertainty as a result of the absence of concrete guidelines for the required balancing between fundamental rights.¹⁶⁶ The ECJ’s examination in *UPC Telekabel* provides

Property and Competition Law 386; L.R. Helfer & G.W. Austin, *Human Rights and Intellectual Property – Mapping the Global Interface*, (Cambridge: CUP 2011) 509.

¹⁵⁹ See Mylly (n 72) 112-113.

¹⁶⁰ Mylly (n 72) 126-127.

¹⁶¹ ECJ 15 September 2016, C-484/14, *McFadden*, para 96.

¹⁶² See also: Husovec (n 146) 122-124.

¹⁶³ ECJ 15 September 2016, C-484/14, *McFadden*, para 91-94.

¹⁶⁴ Griffiths (n 65) 65.

¹⁶⁵ Griffiths (n 65) 65, 72.

¹⁶⁶ See also: Angelopoulos (n 72); Oliver & Stothers (n 11). Both authors mention *UPC Telekabel* in this respect. We would argue that this case does not belong in this enumeration, as the case, at minimum, provides useful considerations regarding the effectiveness standard.

more insight regarding the legal standards that surround remedial measures, though it remains short on specifics. The *McFadden* judgment provides helpful guidelines for the required proportionality review. The outcome of individual cases will remain indeterminate to a certain degree, as Oliver and Stothers strikingly illustrate by bringing up the disagreements between Advocates General and the ECJ in rulings concerning copyright injunctions.¹⁶⁷

On another note, the extensive use of fundamental rights to delimit enforcement measures has been criticised by various authors.¹⁶⁸ This criticism is not likely to evaporate, as the ECJ seems to emphasise the importance of fundamental rights even more in *McFadden*.¹⁶⁹ However, this can also be seen as a natural consequence of the entry into force of the Charter, as the acknowledgment of fundamental rights as primary EU law inevitably leads to ‘cross-fertilisation of the private and public law spheres’.¹⁷⁰

The specific details of the proportionality test still largely depend on the rights in question, the measures at hand and the relevant circumstances. The balancing method is inherently case-related, which makes it difficult to identify generally applicable standards from ECJ case law. The EU legislature may be best placed to lay down a more structured framework that offers a solution to the various fundamental rights conflicts that may occur. Until then, the ECJ has provided useful conditions under which the admissibility of copyright injunctions can be assessed.

¹⁶⁷ Oliver & Stothers (n 11) 558. See for examples of such disagreements ECJ 15 September 2016, C-484/14, *McFadden*; ECJ 27 March 2014, C-314/12, *UPC Telekabel*.

¹⁶⁸ See M. Husovec, ‘Intellectual Property and Integration by Conflict: The Past, Present and Future’ (2016) 18 *Cambridge Yearbook of European Legal Studies* 268; Griffiths (n 65), Mylly (n 72).

¹⁶⁹ Husovec (n 146) 125.

¹⁷⁰ Angelopoulos (n 105) 24.